IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL, CIVIL JURISDICTION

WRIT PETITION NO.867 OF 2006

Fatimabi Mohamed Hanif....Petitioner

Versus

Brihanmumbai Municipal

Corporation & Anr. ...Respondents

Mr. M.P.Vashi, for the Petitioner

Ms. T. Puranik, for the Respondents

CORAM: **F.I. REBELLO &**

MRS.V.K.TAHILRAMANI, JJ.

DATE: 20TH JUNE,2006

P.C.

. Petitioner was employed with respondent No.1 and has retired as Deputy Head Teacher on 1st April, 2003 due to superannuation. The petitioner presently is aged 61 years. The petitioner joined the service of Respondent No.1 on 1st August, 1972 and was confirmed on 1st June, 1976. Before the petitioner joined services she had three children who were born in 1968, 1969 and 1970. She gave birth to fourth child and was sanctioned half pay leave (Maternity Leave) from 11th June, 1974 to 22th July, 1974. The petitioner underwent operation for breast cancer on

28th July, 2001. A certificate was issued by the concerned Oncologist on 8th January, 2002. The petitioner between the period 23rd July, 2001 to 14th June, 2002 applied for special leave for cancer patients under B.M.C. Service Regulations and she was paid salary for that period. The petitioner retired on 1st August, 2003. When she received post retirement benefit she found that an amount of Rs.1,40,050/- was deducted from her Provident Fund treating the maternity leave in 1974 and the special leave for cancer as without pay and recovering the amount of salary paid to her for the said leave period. This was on the basis that she had breached Regulation No.282 of 1989 Municipal Service Regulations with regard to restricting the size of the family upto three living children and as she had given birth to a fourth child whilst in employment. It is the case of the petitioner that she wrote to B.M.C. to relax Regulation No.202 as per Regulation 4. Her representation was not considered. In view of that the present petition on the ground that the deduction of a sum of Rs.1,40,050/- was illegal.

2. On behalf of the respondents Ravindra Kale has filed an affidavit. It is admitted that the petitioner was on medical leave since 23rd July, 2001 to 14th June, 2002 for a total period of 326 days as she had to undergo cancer treatment and was sanctioned by the Municipal Medical Examiner by

certificate No.11070 dated 7th August, 2002. It is pointed out that at the time of preparation of pension scheme petitioner had stated that she had four live children as her legal heirs and the Competent Authority had given remark that the petitioner will not be entitled for paid leave from 23rd July, 2001 to 14th June, 2002 as previously sanctioned and the same will be treated as leave without pay. Attention is thereafter invited to B.M.C. Service Rules and it is pointed out that under Rule 202 if any person who is suffering from cancer, T.B., Leprosy or paralysis having more than three children then such a person is not entitled for full pay leave as granted by Rule 193(2) of the B.M.C. Service Rules. However, if either of the spouse undergoes sterilization operation then he/she can avail the benefit of full pay leave as per Rule 202 of the B.M.C. Service Rules.

3. On behalf of the petitioner her learned Counsel contends firstly that the said Rules were framed on 15th October, 1992 extending Tuberculosis concession to B.M.C. employees suffering from cancer, Leprosy or Paralysis. The deduction made from the petitioner's terminal benefits are from 11th June, 1974 to 22nd July, 1974 in the matter of maternity leave and from 23rd July, 2001 to 14th June, 2002 for cancer treatment leave. It is submitted that the Rule regarding leave for sickness

including Tuberculosis, paralysis or cancer has nothing to do whether a person is sterilized or not and in these circumstances the Rule to that extent is arbitrary. Even otherwise after a person had crossed the age of child bearing to insist on sterilization is clearly arbitrary. It is further pointed out that maternity leave for the period from 11th June, 1974 to 23rd July, 1974 was granted much earlier and consequently the same could not have been deducted at the time of availment of terminal benefits.

4. From the translation of Rule 202 it would be clear that after the provision came into effect an employee would not be entitled to benefits if such employee had three children alive. The Regulations were framed on 15th October, 1992. The maternity leave was for the period 11th June, 1974 and 27th July, 1974 and consequently no recovery could have been made from the petitioner based on the Regulation which came into force on 15th October, 1992. Further after sanctioning the leave and paying the same it could not have been recovered after nearly 18 years.

5. We then come to the issue of cancer leave. The proviso itself states that the leave would be available if any of the spouses undergoes birth control operation. The petitioner retired on 1st April, 2003. Considering that the age of retirement is 58 when she was granted cancer leave between 23rd

July, 2001 to 14th June, 2002 she would normally be of the age of 56-57 years which is not a child bearing age. We fail to understand as to how if the petitioner had undergone a birth control measure after that she could have been given the benefit when the effect of such birth control measure would be of no consequence. Clearly, therefore, that Rule has to be construed based on the child bearing capacity of an employee on the date when the petitioner availed of the benefit. That Rule will apply in a case where on the date of the sickness the candidate was capable of giving birth to children. Otherwise it would be arbitrary to call on a person to undergo birth control operation when the primary object of the Rule is to control number of children. We fail to understand as to how the Sterilization Operation has any connection with the person who suffers from cancer, T.B., or paralysis. In respect of all these sickness normally medical leave is granted. In the instant case we do not propose to go into that controversy as we are clearly of the opinion that the requirement of undergoing birth control operation was not required. The very fact that the petitioner was beyond child bearing age by itself would indicate that she would be entitled to the benefit of Rule 202. Rule 202 at the highest would come into operation when the employee is of child bearing age.

6. For the aforesaid reasons we make Rule

absolute in terms of prayer clause (c). We direct the respondents to refund to the petitioner a sum of Rs.1,40,050/- within four weeks from today failing which the respondent will be bound to pay interest at the rate of 8% per annum from the date of deduction till final payment. There shall be no order as to costs.

(**F.I. REBELLO, J)**

(**MRS.V.K.TAHILRAMANI, J).**